

Issues: Group II Written Notice for failure to follow instructions, and Termination due to accumulation; Hearing Date: 03/02/18; Decision Issued: 03/09/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11165; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 11165

Hearing Date: March 2, 2018
Decision Issued: March 9, 2018

PROCEDURAL HISTORY

Grievant was a senior corrections officer with the Department of Corrections (“the Agency”), with multiple years of service. On December 11, 2017, the Agency issued to the Grievant a Group II Written Notice, for failure to follow supervisor’s instructions, with job termination based on the accumulation of active Written Notices. The Grievant has a prior, active Group III Written Notice for violation of DHRM Policy 2.30 and DOP 145.3.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On January 29, 2018, the Office of Equal Employment and Dispute Resolution, Department of Human Resource Management (“EEDR”), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for March 2, 2018, the first date available for the parties, on which date the grievance hearing was held, at the Agency’s designated location.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s exhibits as numbered. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through his grievance filings and presentation, the Grievant requested rescission of the Written Notice, reinstatement to his position, back pay, and restoration of benefits.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. However, § 5.8 states "[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on its *Standards of Conduct*, Operating Procedure 135.1, which defines Group II Offenses to include acts and behavior of a more serious and/or repeat nature that require formal disciplinary action. The purpose of the policy is stated:

The purpose of this policy is to set forth the Commonwealth's Standards of Conduct that the Department of Corrections must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness.

Agency Exh. 3.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed the Grievant as a corrections officer when it learned that he had engaged in inappropriate conduct with an inmate. The Written Notice provided:

On 9/23/17 you were involved in a verbal confrontation with an offender and [were] directed to work outside the secure perimeter until the matter could be investigated. On 10/2/2017 you met with Major [M], Capt. [W] and Lt. [H] and [during] this meeting you admitted to using vulgar language when speaking to the offender during the 9/23/17 incident. You were then advised not [to] work in Housing Unit 4. You were advised that a disciplinary hearing would be scheduled. On 10/11/17 you left your assigned post and initiated [contact] with the offender from the 9/23/17 incident after you had been advised on two occasions not to make contact. You also left your post without permission resulting in negligence on the job that could have resulted in serious injury. This Written Notice is issued for Failure to Follow Supervisor[']s Instructions.

Agency Exh. 1.

The Grievant admitted to the verbal exchange with the offender on September 23, 2017, and conceded that it was unprofessional conduct. The Grievant testified that after the instruction not to work in Housing Unit 4, on the weekend of October 5, 6 and 7, 2017, he was assigned to do rounds and make the count that included Housing Unit 4. This assignment came from Lt. H, who was aware of the major's order following the September 23, 2017, incident. The Grievant also understood that the offender in question was to be transferred and he assumed that the transfer had occurred by the time he was assigned to make rounds October 5, 6 and 7. Unbeknownst to the Grievant, the offender, who was present but did not encounter the Grievant on October 5, 6 or 7, learned that the Grievant was working in Housing Unit 4 and made a complaint.

On October 11, 2017, the Grievant testified that he was working in Housing Unit 5 and there was mail received that belonged to offenders in Housing Unit 4. The Grievant testified that the common practice when that happens is to walk the mail to the correct housing building, and that this had been covered and directed during muster. He testified that such a brief deviation is not considered leaving post, as it is common practice. He actually walked onto the housing floor to deliver the mail instead of giving it to the sergeant on duty because he knew the sergeant had difficulty walking. At this point, the Grievant encountered the offender, leading to the sergeant intervening and the resultant, current discipline for disobeying the major's order not to work in Housing Unit 4. The Grievant explained that he was following the last order given (coming from Lt. H to make rounds including Housing Unit 4).

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the manner, tone, and demeanor of the witnesses, I find all the witnesses credible. Based on the credibility of the Grievant's testimony, I find that he reasonably believed that the offender in question had been transferred by October 5, and that he was not disobeying orders by making rounds in Unit 4. Lt. H. was aware of the major's order to the Grievant not to work in Housing Unit 4 (because of the presence of the offender), and, yet, Lt. H. assigned the Grievant to make rounds in Housing Unit 4 for three days—October 5, 6 and 7. However, upon encountering the offender in Housing Unit 4 on October 11, the Grievant initiated further contact with the offender rather than withdrawing. This conduct of initiating contact with the offender was contrary to the major's order regardless of the intervening assignments to make rounds.

Because of this factual finding, I must conclude that the Grievant failed to follow supervisor's instructions. Such offense is specifically identified as an example of a Group II

offense in Operating Procedure 135.1, *Standards of Conduct*. Agency Exh. 3. However, because the Grievant's testimony regarding the common practice of delivering mail was unrebutted, I will modify the Written Notice to exclude the discipline ground of leaving his post without permission.

Under the administrative rulings from EEDR, when the reduced discipline still supports termination, the termination should be upheld. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness. The Agency has the discretion to act within the continuum of disciplinary options. The Agency has proved (i) the employee engaged in the behavior described in the Written Notice (as modified), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the termination must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1. Further, § VI.B.1, provides:

When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges.

While the nature of the charges is modified, the policy directive to the hearing officer is clear—to maintain the maximum reasonable discipline imposed by the Agency for the upheld offense(s). Thus, termination, unless the Agency indicates a lesser penalty may be imposed, is supported by the disciplinary record. The Agency has not indicated a lesser penalty.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

As circumstances considered, the Written Notice recognized that the Grievant had an active Group III Written Notice issued on April 11, 2017. Regarding the level of discipline, the Agency had leeway to impose discipline along the permitted continuum. Given the nature of the offense, as decided above, I find no evidence or circumstance that allows the hearing officer to reduce the discipline further than explained above. The Agency has proved (i) the employee engaged in the behavior described in the Written Notice (as modified), (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline of termination, based on accumulation of offenses, must be upheld absent evidence that the discipline exceeded the limits of reasonableness. Hearing Rules § VI.B.1.

Although the aspect of discipline for leaving post without permission is reversed and removed from the Written Notice, the remaining offense still falls squarely in the category of failing to follow supervisor's instruction—a Group II offense. Because the hearing officer may not substitute his judgment for that of Agency management, there are no mitigating factors upon which the discipline may be reduced.

DECISION

For the reasons stated herein, I uphold the Agency's discipline of a Group II Written Notice for failing to follow supervisor's instruction, but I remove the offense aspect of leaving post without permission. Because the accumulated disciplinary record of a Group II Written Notice, with the prior, active Group III Written Notice, supports termination, I must uphold the disciplinary termination.

APPEAL RIGHTS

You may request an administrative review by EEDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance

procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.¹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", is positioned above a horizontal line.

Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EEDR before filing a notice of appeal.